ORIGINAL

No. 89-595

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHN M. RATELLE, WARDEN

Petitioner,

vs.

DWIGHT EDWARD MARTIN,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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34pp

QUESTIONS PRESENTED

1. Whether a motion for self-representation that was necessarily made on the eve of trial for a good cause which was not made known to the court because the court summarily denied the motion without inquiry, and which was not explicitly conditioned upon a request for a continuance, although a request for a continuance was made, should have been granted where neither the appointed defense counsel nor the prosecutor was ready to proceed, and where the court ultimately continued the case for seven days to permit them to become ready.

2. Whether relief in federal habeas corpus proceedings is available to a state defendant where the state trial court failed to make the necessary inquiry mandated by the state's highest court pursuant to state procedures for evaluating the timeliness of a motion for self-representation and thereby precluded the defendant from making the showing that the state high court requires.

3. Whether a true difference exists between the California rule and the federal rule for assessing the timeliness of a motion for self-representation, or merely a distinction without a difference.

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This case comes before the Court on a Petition by John M. Ratelle, Warden, for a Writ of Certiorari. At issue is a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment by the United States District Court for the Central District of California granting a conditional Writ of Habeas Corpus to the Respondent, a California state prisoner. The conditional Writ was granted because the District Court found that the Respondent had been unconstitutionally denied his right to self-representation by the state trial court.

STATEMENT OF THE CASE

A. Summary of State Court Proceedings Prior to April 28, 1981

An information charging the Respondent with violation of Penal Code Sec. 187, murder, on or about May 30, 1980, was filed in the Los Angeles County Superior Court on November 5, 1980 (C.T. 1)[1/]. Respondent was arraigned on the information on November 5, 1980, the public defender was appointed to represent him, and the case was set for trial setting on December 5, 1980

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1. "C.T." refers to the Clerk's Transcript in Respondent's state appeal.

(C.T. 2). Thereafter, there were nine continuances to April 28, 1981. Of these, six were requested by the public defender for a total of 86 days (C.T. 4-5, 7, 9-14), one was requested by the District Attorney for a total of 14 days (C.T. 6), one was stipulated between the parties for a total of 3 days (C.T. 8), and one was at the request of appointed private defense counsel Goldstein for a total of 41 days (C.T. 16).

The original trial date was set only 30 days after arraignment (C.T. 1,2). The single continuance, prior to April 28, 1981, granted petitioner's appointed private counsel (C.T. 14) had been anticipated by the trial court on the day it made the appointment (R.T. 1, lines 19-24)[2]. No continuances had been sought by petitioner as a pro se. From the time the information was filed until the Respondent made his Faretta[3] motion on April 28, 1981, a total of 174 days (48% of one year) had passed.

B. The April 28, 1981 State Court Proceedings

Immediately upon the case being called on April 28, 1981, in the state trial court, petitioner's counsel, Mr. Goldstein, advised the court that petitioner had requested to represent himself (Aug. R.T. 1, lines 13-19)[4]. The following dialogue took place:

> MR. GOLDSTEIN: Your Honor, I'd indicate for the record that I had a discussion with Mr. Martin this morning earlier. Today is the day set for trial.
>
> He has indicated a desire to represent himself in this matter. I will indicate to the court that I have explained to him the hazards of so doing. It is a 187. But it is Mr. Martin's desire to represent himself in this matter.

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2. "R.T." refers to the Reporter's Transcript in the Respondent's state court appeal.

3. Faretta v. California 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (1975)

4. "Aug. R.T." refers to the Augmented Reporter's Transcript of the hearing of April 28, 1981 in Respondent's state appeal.

THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will accommodate you.

THE DEFENDANT: Thank you, Your Honor.

(Aug. R.T. 1, lines 13-23.)

The Court then proceeded to advise the Respondent that the case would go to trial that day, and that the court would "not give [him] one hand whatsoever," intending to treat him instead as the attorneys would be treated (Aug. R.T. 1-2, lines 24-9).

Mr. Goldstein advised the court that he was then still engaged in another jury trial and had not brought petitioner's case file with him because he didn't think the case would go to trial that day. He expressed his opinion that petitioner would need the file in order to proceed (Aug. R.T. 2, lines 10-19). He stated he could get the file to the Respondent that day, and the court expressed the opinion that the Respondent could begin with jury selection without the file (Aug. R.T. 2, lines 13-21). The following exchange then took place between the Court and the Respondent.:

THE COURT: Mr. Martin, do you fully understand now that this matter is ready to proceed today, but that this matter would simply trail that [Mr. Goldstein's other case], start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you are ready to proceed today?

THE DEFENDANT: No, I am not.

THE COURT: Well, I am not going to continue the case.

THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case.

THE DEFENDANT: I am letting the court know I [sic]

like to represent myself.

THE COURT: If you are ready to proceed to trial today, you can represent yourself --

THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

THE COURT: I have no intent of giving you any time. It has been a year, so I have no --

THE DEFENDANT: It has not been a year. I have been in custody for seven months.

MR. MASON [the Deputy District Attorney]: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

MR. GOLDSTEIN: It should be over by Wednesday.

THE COURT: By Wednesday.

MR. MASON: Trail this until Wednesday --

MR. GOLDSTEIN: Could that trail -- I'm sorry -- until Thursday, Your Honor? It should end late Wednesday, I would believe.

THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

MR. MASON: We are not going to select the jury until we have assurances that all witnesses are available.

THE COURT: All right. The matter will go on trailing status then. Thank you very much.

(Aug. R.T. 2-4, lines 27-21.)

C. Subsequent State Trial Court Proceedings.

The trial finally got underway with jury selection on May 5, 1981 (C.T. 22), some seven days after petitioner had originally stated his desire to represent himself and had answered the court that he was not ready to proceed. The jury returned its verdict of guilty of murder on May 15, 1981 (C.T. 110). Respondent was sentenced to state prison for 15 years to life for murder of the second degree, with a two year enhancement for use of a firearm (C.T. 112.)

D. Proceedings in the United States District Court and The United States Court of Appeals

Respondent believes that the Petitioner has adequately and fairly set forth the procedural history of the case in the United States Courts in its Petition, as augmented by the Appendices annexed thereto, and the Respondent will rely thereon.

* * * * * * * * * * * * * *

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

* * * * * * * * * * * * * *

SUMMARY OF ARGUMENT

1. The decision below is not in substantial conflict with state and federal decisions such that certiorari is either necessary or advisable.

2. There is no conflict between the Ninth Circuit Court of Appeal's decision herein and this Court's pronouncement that state defendants must follow state procedural requirements where constitutionally acceptable.

3. The state trial record is so incomplete and confusing that this would be a very poor case through which to announce any rule of law.

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ARGUMENT

I

THE DECISION BELOW IS NOT IN SUBSTANTIAL CONFLICT WITH STATE COURT DECISIONS AND ANOTHER CIRCUIT COURT OF APPEAL ON WHAT CONSTITUTES A TIMELY MOTION FOR SELF-REPRESENTATION SUCH THAT CERTIORARI IS NECESSARY OR ADVISABLE, NOR WILL THE DECISION BELOW RESULT IN A DISRUPTION OF THE ADMINISTRATION OF JUSTICE.

A defendant in a criminal case has a right to represent himself under the Sixth Amendment to the United States Constitution. Faretta v. California, supra., 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (1975). Petitioner complains that the 9th Circuit Court of Appeals' rule that a motion for self-representation made prior to jury selection, unless made to delay the trial proceedings, is timely as a matter of law[5/], is too rigid, citing People v. Burton, 48 Cal.3d 843, 258 Cal.Rptr. 184 (1989), People v. Moore, 47 Cal.3d 63 [252 Cal.Rptr. 494, 762 P.2d 1218] (1988), and People v. Windham, 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187] (1977). The Petitioner chooses the language of the California Supreme Court in Burton very selectively. In fact, that Court spent a great deal more time pointing out the similarities between the California and federal rules than citing differences. Thus, the full quote of the Court follows:

> The federal rule, though it calls motions timely until the jury is impaneled, may in practice differ little from our own rule. It is within the court's discretion to deny a motion made before the jury is impaneled if the court finds the motion is made for the purpose of delay. (Fritz v. Spalding, supra., 682 F.2d 782, 784.) The fact that the granting of the motion wil cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be strong evidence of a purpose to delay. (Ibid.; see also Robards v. Rees, supra, 789 F.2d 379, 383-384 [motion for continuance alone may justify denial of Faretta motion].) In most of the cases finding a motion timely as a matter of law, no continuance would have been necessary. [Citations.] In the instant case, although the motion

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5. Fritz v. Spalding (9th Cir. 1982), 682 F.2d 782, 784, Armant v. Marquez (9th Cir. 1985), 772 F.2d 552, 555, cert. denied, 106 S.Ct. 1502 (1986)

> would be termed timely under the federal rule, the trial court would still have discretion to deny the motion if it considered it entered for the purpose of delay. This differs little as a practical matter from the standard we set out in Windham, supra, 19 Cal.3d 121, except that we place the burden on the defendant to explain his delay when he makes the motion as late as defendant did here. To the extent that there is a difference between the federal rule and the California rule, we find the federal rule too rigid in circumscribing the discretion of the trial court and adhere to the California rule. (See also People v. Moore (1988) 47 Cal.3d 63, 80-81 [252 Cal.Rptr. 494, 762 P.2d 1218].)

People v. Burton, supra., 48 Cal.3d 843, 854, 258 Cal.Rptr. 184 190-191 (1989), (Emphasis added; fn. omitted.)

Moreover, in ruling against the defendant, the Burton court found that the trial court had inquired into his dissatisfaction with his counsel, and the defendant's need for a continuance. "The court gave defendant unlimited opportunity to explain why he felt he should represent himself." Id., p. 854, 191. This is quite contrary to the facts herein, where the court made no inquiry at all of the Respondent, having obviously determined that no matter what the reason for a continuance, it would not be granted.

The California Supreme Court, in People v. Windham, supra., 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187][6], set forth a procedure for assessing an untimely motion:

> When such a midtrial request for self-representation is presented the trial court shall inquire sua sponte into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is latter required. Among the factors to be considered by the court in assessing such request made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record on such relevant considerations, the court should exercise its discretion and rule on the defendant's request.

(People v. Windham, supra., 19 Cal.3d 121, 128-129, 137 Cal.Rptr. 8, 12-13, 560 P.2d 1187.)

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6. Although cited by Burton, the Windham situation is quite different in that the defendant in Windham did not seek self-representation until after his trial had commenced and just before the start of the third and final day of testimony.

It is obvious that the trial court itself in the instant case failed to follow the California rule, because it made no inquiry at all. Such was the case in People v. Hernandez (1985) 163 C.A.3d 645, 209 Cal.Rptr. 809, where the California Court of Appeal solved the problem by appointing a referee whose inquiry established that there was no abuse of discretion. Id., 653-655, 814-815. In essence, that's exactly what happened in the instant case, except that the referee (the Magistrate) was appointed by the U.S. District Court, and his findings, adopted by that Court and by the 9th Circuit Court of Appeals as well, were that in this case the trial court did abuse its discretion in denying the Respondent's motion for self-representation.

In People v. Herrera (1980) 104 C.A.3d 167, 163 Cal.Rptr. 435, the California Court of Appeals held that a motion for self-representation made on the day of trial was not untimely. Id., pp. 174-175, 440. "To hold a motion for self-representation made by a defendant at his earliest opportunity is untimely when that 'earliest opportunity' appears to be shortly before trial, would effectively thwart defendant's constitutional right to proceed in propria persona as established in Faretta v. California (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]." Id., p. 174, 440, (fn. omitted). Of course, in that case there was no motion for a continuance. Id., p. 174, 440. Nevertheless, a Windham inquiry by the trial court herein should have demonstrated to that court, as an inquiry did demonstrate to the U.S. District Court and the 9th Circuit Court of Appeals, that the motion for a continuance was justified.

In short, a proper exercise of the California rule by the trial court would have led to the same result as that achieved by the federal courts, and there is no need for this Court to intervene.

Petitioner also cites cases from other jurisdictions to support his assertion that certiorari in the instant case is necessary, but none support this premise.

In State v. Garcia, 92 Wash.2d 647 [600 P.2d 1010, 1015] (1979), the court found that a self-representation motion had

not been made, and therefore the issue of its timeliness needn't arise. Nevertheless, in dicta, the court stated that if the motion is made shortly before trial, its resolution depends on the facts with "a measure of discretion" in the trial court. Id., p. 1015.

In Williams v. State, 655 P.2d 273 (Wyo. 1982), a self-representation motion made the day before trial was held not to be timely, but the trial court adequately considered the relevant factors, such as the appointed attorney's skill and judgment, and the fact that the defendant's request for a 60 day continuance would have caused disruption of the judicial process because he was being tried jointly with another defendant. Id., p. 277.

In State v. Kender, 21 Wash.App. 622 [587 P.2d 551] (1978) a motion for a continuance in order for a defendant to represent himself as co-counsel with his appointed attorney was denied because the record failed to disclose any disagreement with his counsel or a reason for a continuance. Id., p. 554.

In State v. Herron, 736 S.W.2d 447 (Mo. 1987) the court, after detailed factual inquiry to determine appellant's competence to proceed pro se, determined that the request was made strictly for the purpose of delaying the proceedings. Id., p. 449.

Finally, the Eighth Circuit decision cited by Petitioner, Parton v. Wyrick, 704 F.2d 415 (8th Cir. 1983) examined a Missouri state trial which occurred before Faretta v. California, and therefore applied Missouri law as it existed pre-Faretta to decide the self-representation issue. Nevertheless, in dicta, the Parton court stated, without analysis, that even post-Faretta the trial court had acted within its discretion in denying the motion for self-representation made on the morning of trial. Id., p. 417. Of course, although the defendant's motion to disqualify his attorney was made prior to jury selection, the actual motion for self-representation was not made until after the jury had been sworn, Id., p. 416, and would have been untimely under the 9th Circuit's decisions as well.

See Armant v. Marquez (9th Cir. 1985), supra., 772 F.2d 552, cert. denied, 106 S.Ct. 1502 (1986), Fritz v. Spalding (9th Cir. 1982), supra. 682 F.2d 782.

II

A HEARING IS NOT NECESSARY TO RESOLVE CONFLICTS BETWEEN THE NINTH CIRCUIT DECISION AND THIS COURT'S DECISIONS MANDATING THAT STATE DEFENDANTS MUST FOLLOW STATE PROCEDURES

Citing Teague v. Lane, 489 U.S. ___, L.Ed.2d 334, 109 S.Ct. 1060 (1989), the Petitioner argues that a hearing is necessary to resolve conflicts between the Ninth Circuit decision herein and this Court's decisions mandating that state defendants must follow state procedures. No hearing is necessary, however, because the Respondent did not fail to follow state procedures for timely invocation of his right to self-representation. The relevant state procedures are set forth in People v. Windham, supra., as quoted on p. 7 above. It is clear from the record below that it was the trial court, not the Respondent, which failed to follow procedures. Windham requires a sua sponte inquiry into the factors cited to permit the court to exercise its sound discretion, but all the trial court in the instant case did was to summarily deny the Respondent his right to self-representation based on the court's aversion to granting him a continuance:

> THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case. [C.T. 3, Emphasis added.]

The court never inquired into Respondent's reason for wanting to represent himself or for a continuance. In a sworn statement, "Petitioner's Response to Courts Inquiries of September 9, 1985," supplied to the magistrate in the District Court, Respondent made it clear that the reason he wanted to represent himself and to obtain a continuance was because his attorney had failed to subpoena two necessary witnesses, which Respondent only learned the day he made his motion. These

representations were relied upon by the magistrate. (See Petition, Appendix E, pp. 84-85.) The trial judge would have learned this, too, if only he had inquired.

Moreover, the trial court was discriminatory in its aversion to granting a continuance. Neither attorney was ready to proceed on the date set for trial. Mr. Goldstein was already in trial on another case, and Mr. Mason, the Deputy D.A., didn't know if he had his witnesses and asked to trail the case (Aug. R.T. 3, lines 26-27). Neither attorney answered "ready," as the court was attempting to compel the Respondent to do, and Mr. Mason ended the session by warning the court that "We are not going to select the jury until we have assurances that all witnesses are available." (Aug. R.T. 4, lines 18-19.) The trial did not start until seven days after the Respondent's motion for self-representation was denied. We can't know if, with the benefit of direct access to a court-appointed investigator, the Respondent operating pro se would not have been able to get his witnesses during this seven day delay and been able to answer "ready" on the date the trial actually commenced.

Finally, in Teague v. Lane, supra, the defendant sought to raise the relevant issue for the first time in the federal habeas proceeding, and this Court held he had thereby waived it. Id., at. pp. ___, 347-348, ___. The Court thereby distinguished the situation from that in Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308, 109 S.Ct. ___, and in so distinguishing affirmed that "'a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.'" Teague v. Lane, supra., 489 U.S. ___, 103 L.Ed.2d 334, 348, 109 S.Ct. 1060, ___ (1989).

The denial of Respondent's motion for self-representation was raised in the state appeal, and the failure of the trial court to follow state procedures was discussed in Respondent's state appellate briefs. (See Appendix 1 [Pertinent portions of

Respondent's "Appellant's Opening Brief" in the California Court of Appeal] and Appendix 2 [Pertinent portions of Respondent's "Appellant's Reply Brief" in the California Court of Appeal].) The California Court of Appeal did not "clearly and expressly state[] that its judgment rests on a state procedural bar," but rather decided against Respondent on the merits. No procedural default on the issue was raised at all by the California Court of Appeal. (See Petition, Appendix F, p. 101.) Petitioner's reliance, therefore, on Teague v. Lane, supra., 489 U.S. ___, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989) is misplaced.

III

THE STATE TRIAL RECORD
IS SO INCOMPLETE AND CONFUSING
THAT THIS WOULD BE A VERY POOR CASE
THROUGH WHICH TO ANNOUNCE ANY RULE

Petitioner complains that the 9th Circuit's interpretation of what is and is not a timely Faretta motion "is a recurring issue," (Petition, pp. 18-19) and, therefore, even though the opinion in the instant case is not published and is of no precedental value, the issuance of a Writ of Certiorari is necessary. Respondent's reply is that if the issue is as burning as the Petitioner would have us believe, there must be a case which is a better vehicle than the instant one to deal with it. This trial court record is confused. As above stated, although the court demanded that the Respondent answer "ready" to enjoy the right of self-representation, neither attorney was required to so state. In fact, a continuance of seven days was granted to the attorneys. And, of course, the court failed to conduct the Windham inquiry mandated by the California Supreme Court.

In addition, although the 9th Circuit found that there was an inextricable linkage between the request for self-representation and the motion for a continuance (Petition, Appendix A, p. 36), Respondent disagrees. At no time was the Faretta motion conditioned upon the granting of a continuance motion. When the court first advised the Respondent that it would grant his motion conditioned upon the case proceeding to

trial that day, the Respondent answered, "Thank you." (Aug. R.T. 1-2, lines 24-9.) When asked again by the court if he understood that if he represented himself the matter would proceed that day, the Respondent replied "Yes, Your Honor." (Aug. R.T. 2-3, lines 27-4). At this point the court inquired if he were "ready" to proceed that day, and the Respondent replied negatively (Aug. R.T. 3, lines 5-6). To be "ready" is not the same as to be "willing" to proceed. The court never asked if he were willing, only ready. When the court advised the Respondent that he could not represent himself based on this response, the Respondent pointed out to the court that he was merely replying to the court's question, and thus not demanding a continuance (Aug. R.T. 3, lines 8 9). It was only when the court again conditioned the Respondent's self-representation right on his answering ready that the issue of a continuance came up and the self-representation issue became sidetracked. A fair reading of the record reveals that the Respondent would have proceeded pro se without a continuance if that were required by the court. (Under the circumstances, the court's denial of a continuance was a separate abuse of discretion.) Every trial lawyer knows that courts have compelled attorneys to proceed with their cases, even when they have not answered ready. To require the Respondent to assure the court of his preparedness, as opposed to his willingness, to represent himself was unfair and discriminatory. Of course, as Armant v. Marquez, supra., 772 F.2d 552, 558, held, if he were unprepared through no fault of his own, and if his motion was timely under all the circumstances, a continuance to permit a meaningful exercise of the right of self-representation was in order.

The adage says that bad facts make bad law. This case presents bad facts. In the absence of publication, it has no bearing on anyone other than the Respondent and Petitioner. If this Court is inclined to accept the Petitioner's invitation to make a pronouncement on the issue of a timely Faretta motion, and if the cases are as numerous as he asserts, the Respondent suggests it would be advisable to await a case where the issue

is more clearly and squarely presented.

Finally, regardless of allegedly divergent state and federal rules, the 9th Circuit seems to have applied California's "Sound Discretion/Windham" Rule in this case rather than its own "Timely Before Jury Selection Per Se Rule." Indeed, the Court of Appeals found that the trial court abused its discretion in denying a continuance to Respondent, with constitutional ramifications. Clearly, the analysis engaged in by both the District Court and the Court of Appeals, coupled with the Court of Appeals' refusal to affirm the granting of the conditional writ of habeas corpus strictly on the basis of the Faretta error (announced in its first memorandum opinion; Petition, Appendix A, p. 38) alone evidences the exercise of the same sort of analysis mandated by the California Supreme Court for California trial courts in Windham. Therefore, no matter the rule applied, the Petitioner has suffered no prejudice.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Habeas Corpus should be denied.

Dated: November 19, 1989

Respectfully submitted,

Saul M. Ferster
Attorney for Respondent

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DWIGHT MARTIN, Defendant and Appellant.	2d Crim. 40292

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE EVERETT E. RICKS, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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and Appellant

was not a model of clarity and that it was up to counsel as to whether sentence should be made now or a report should be awaited. Magee's counsel stated that it would take at least three weeks for a report and that "we are willing that judgment be pronounced today." ... The court then held, 'This action constituted a withdrawal of the application for probation and a waiver of the requirement that a probation report be had before sentence. Under the circumstances there was no error in the court's proceeding to sentence without a probation report..."

The case at bench can be distinguished from the above-cited cases as there was no plea bargain, and appellent's waiver was against the advice of counsel. Appellant contends that the mandatory language of §1203(b) requires the court to obtain a probation report in every felony case because this report assists the court in determining an appropriate disposition after conviction and insures that important rights are not denied to any person convicted of a felony. Appellant also contends that, in any case, appellant's waiver against his counsel's advice, did not work a withdrawal of the required report, and the record clearly demonstrates that the court was aware of defense counsel's opposition.

III.

THE TRIAL COURT ERRED IN FAILING TO ALLOW APPELLANT TO REPRESENT HIMSELF

A hearing was held on April 28, 1981, and is contained in the Reporter's Augmented Transcript [hereinafter "RAT"], a 4-page volume which was augmented to this record on appeal. At the hearing, the following occurred:

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"MR. GOLDSTEIN: Your Honor, I'd indicate for the record that I had a discussion with [appellant] this morning earlier. Today is the day set for trial. He has indicated a desire to represent himself in this matter. I will indicate to the court that I explained to him the hazards of so doing. It is a 187. But it is [appellant's] desire to represent himself in this matter.

"THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will accomodate you.

"THE DEFENDANT: Thank you, Your Honor.

"THE COURT: But I want you to understand that we will proceed to trial in this matter today. If you want to try to represent yourself, you are welcome to do it, but I think you are a complete idiot. I will not give you one hand whatsoever. ...

"THE COURT: ... As far as I am concerned, you will absolutely be commiting suicide, but that will be up to you.

"THE DEFENDANT: Thank you.

"MR. GOLDSTEIN: Your Honor, may I indicate that I am currently engaged in Department 121. Because of that, I didn't feel this matter would go to trial today. I have advised [appellant] that I will bring him my entire file--if that's his desire--I will bring it to him tomorrow. What I am indicating is I don't have the file with me today, and I think [appellant] would need that file. I probably could arrange to have it for him today. I could have it brought down, whatever the court's desire is.

"THE COURT: I assume he wouldn't need the file to select the jury today and give it to him tomorrow. I think he is completely insane to do it.

"MR. MASON: I don't understand counsel. Today is the

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date of trial. He didn't bring the file with him.

"MR. GOLDSTEIN: As I indicated, I am engaged in a jury trial. I am giving my closing argument at 10 o'clock.

"THE COURT: [appellant], do you fully understand now that this matter is ready to proceed today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do.?

"THE DEFENDANT: Yes, Your Honor.

"THE COURT: Are you ready to proceed today?

"THE DEFENDANT: No, I am not.

"THE COURT: Well, I am not going to continue the case.

"THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

"THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent to continuing this case.

"THE DEFENDANT: I am letting the court know I like to represent myself.

"THE COURT: If you are ready to proceed to trial today, you can represent yourself --

"THE DEFENDANT: I was ready in December. When the Peple wasn't ready, I gave the People time. Now, why can't the people give me time?

"THE COURT: I have no intent of giving you any time. This case goes back to May 30th, 1980. It has been a year, I have no --

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"THE DEFENDANT: It has not been a year. I have been in custody for seven months.

"MR. MASON: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

"THE COURT: Well, the matter will simply trail, Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

"MR. GOLDSTEIN: It should be over by Wednesday. . . .

"MR. MASON: Trail this until Wednesday --

"MR. GOLDSTEIN: Could that trail--I'm sorry--until Thursday, Your Honor? . . .

"THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

"MR. MASON: We are not going to select the jury until we have assurances that all the witnesses are available.

"THE COURT: All right. The matter will go on trailing status then. Thank you very much." (RAT-1-4).

Appellant contends that the above-stated record reveals that, although the court fully intended to "trail" the matter, it denied appellant his request for a "continuance." Although the court may have utilized the linguistic differences in what it felt were appellant's best interests, nevertheless, this

interferred with a right of constitutional dimension. To phrase appellent's argument as simply as possible, if a court is intending to trail a matter anyway, why not offer this time to a defendant who wishes to represent himself but is simply not ready to proceed on THAT day (prior to the intended trailing.)

Clearly, appellant did not know the difference between trailing and continuance and yet, for appellant's purposes, they were one and the same. It should be recalled that appellant stated that he wanted to represent himself and that he was not ready to proceed "today." Instead of the court asking appellant if he would be ready to proceed in a few days on this trailing case, it demanded that appellant be ready to start today and that he would not be granted a "continuance." However, the record is clear that (1) the defense counsel required that the matter be trailed; (2) the prosecutor asked the matter be trailed for a few days so he could do a witness check (RAT-3) and this was known to the court before it made the finding that appellant's motion was untimely; and immediately after making the finding, the prosecutor stated that he was not going to select the jury until he had assurances that all witnesses were available -- to which the court replied, "All right. The matter will go on trailing status then."

Faretta v. California, 422 U.S. 806 (1975), established that a defendant competent to waive counsel has an affirmative right to represent himself. In People v. Windham, 19 Cal.3d 121, 127, 137 Cal.Rptr.8 (1977), the California Supreme Court held "that in order to invoke the constitutional mandated unconditional right of self-representation a defendant in a criminal

trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.[5]"

Footnote 5 of Windham, explains the Court's meaning of "reasonable time" as follows:

"[5]Our imposition of a "reasonable time" requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the Faretta mandate as a means to unjustfiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceeding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation. Thus if the reason why a defendant makes a request for self-representation in close proximity to trial is because he disagrees with his appointed counsel's desire for a continuance, some delay may be necessary whether or not the defendant's motion is granted. In such a case the very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion. Furthermore, as defense counsel himself seeks a continuance for the purpose of further trial preparation it would be illogical to deny a motion for self-representation

under such circumstances simply because the motion is made in close proximity to trial. There may be other situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly process of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard."

Appellant's attorney was not ready to proceed, and had not even brought the file with him. Appellant's attorney wanted the matter to "trail," and the prosecutor wanted it to "trail." The court was very willing to let the case trail four or five days, but was unwilling to give appellant a "continuance." There is nothing on this record to indicate that appellant was seeking to delay the orderly process of justice. He merely said that he was not ready to proceed today -- and apparently no one else was prepared to proceed today either. Appellant, apparently unaware of the difference between trailing and continuance may have believed that during trailing, he would have to pick a jury and do other things that he was not prepared to do that day. In reality, nothing was going to happen until the defense counsel finished the other case and the prosecutor could do a witness check. Appellant contends that under the reasoning of Windham, his constitutionally based right of self-representation was violated, even if his choice appeared to be unwise and could very well lead to detrimental consequences.

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As explained in Ferrell v. Superior Court, 20 Cal.3d 888, 891, 576 P.2d 93, 144 Cal.Rptr. 610 (1978), "A defendant in a criminal proceeding has a federal constitutional right to represent himself without counsel if, upon timely motion ..., the trial court determines that he voluntarily and intelligently elects to do so ... If these conditions are satisfied, the trial court must permit an accused to represent without regard to the apparent lack of wisdom of such a choice and even though the accused may conduct his own defense ultimately to his own detriment." People v. Teron, 23 Cal.3d 103, 588 P.2d 773, 151 Cal.Rptr. 633 (1979).

CONCLUSION

The court below erred in denying appellant's motion for clergyman-penitent privilege; erred in permitting appellant to waive the compilation of a probation report against the advise of counsel; and erred in denying appellant his constitutional right of self-representation.

For the above reasons, it is respectfully urged that this Court reverse the judgment of the court below.

Dated: February 15, 1983.

Respectfully submitted,

Rosana M. Selesnick

ROSANA M. SELESNICK
Attorney for Appellant

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APPENDIX 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DWIGHT MARTIN, Defendant and Appellant.	2d Crim. 40292

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE EVERETT E. RICKS, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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and Appellant

a distinctly different faith than Mr. Hargrew." Appellant urges his relationship with Minister Hargrew, who he called preacher and sought counsel from, was of a religions nature; and request for a Koran further illustrates appellant's religious nature. It is contended that a confidence made to a Catholic priest is a confidential communication even if the person confessing is of another faith. The fact is, there is no evicence on this record as to whether appellant was a Baptist and later became interested in the teachings of the Koran. Appellant's religious beliefs at the time of the incident and subsequent thereto are merely conjecture on the part of Respondent.

Appellant contends that Mr. Hargrew was a licensed minister of the Baptist church and counseled appellant on an on-going basis; the communication at the bus station was made after the ride concluded and appellant was waiting inside the bus station; and appellant's religious affiliation, Baptist or otherwise, is not dispositive of any issues herein.

II.

A PROBATION REPORT WAS REQUIRED

For purposes of this issue, appellant reiterates the arguments made in Appellant's Opening Brief.

III.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S RIGHT OF SELF REPRESENTATION

Appellant's Opening Brief, recited the record which revealed that, although the court fully intended to "trail" the matter, it denied appellant his request for a "continuance." The question presented was, if a court is intending to trail a matter anyway

(3)The length and stage of the proceedings;(4)The disruption and delay which might be expected if the delay were granted;(5)Defendant's proclivity to substitute counsel.

"It is clear from the record the trial court made no attempt to comply with the mandate of the Windham court when it stated: 'When such a ... request for self-representation is presented, the trial court shall inquire sua sponte into the specific factors underlying the request thereby assuring a meaningful record in the event that appellate review is later required.

"Without such a record we can only speculate that a consideration of those factors may well have demonstrated to the trial judge reasons to exercise his discretion to allow Herrera to proceed in propria persona. The record does show Herrera had conceived a well considered defense. At least Herrera felt he was receiving poor representation. The proceedings were obviously very short; a one-day trial after the jury had been sworn two days earlier. The court was unable to proceed on the day of the trial and continued the matter for two days after the jury was sworn. Finally, the record fails to show any past use of this request as a device to continue the trial and in fact apparently Herrera was ready to proceed immediately in that he did not request a continuance of the trial date after stating the motion. Thus, even if the request was untimely, the court failed to consider the motion under

the Windham standards." [Emphasis original].

In the case at bench, both counsel were both technically seeking a continuance in that they wanted the matter trailed to a date certain -- "Could that trail until Thursday, your Honor." Permitting appellant to represent himself on that Thursday would not have obstructed the orderly administration of justice, and thus appellant's motion was not untimely.

The court did not inquire into specific factors underlying the request and did not make a meaningful record. Even if, arguendo, the request was untimely, the court failed to consider the motion under Windham standards. The court was unable to proceed on the day of trial and should have offered appellant this time. It was illogical to deny the motion for self-representation under such circumstances simply because the motion was made in close proximity to trial. People v. Windham, supra at footnote 5.

CONCLUSION

The clergyman-penitent privilege was applicable to the privileged communication made by appellant to Minister Hargrew; a probation report was required for proper sentencing; and appellant was improperly denied his right of self representation, even if his request could be considered untimely.

For the above reasons, it is respectfully urged that the Court reverse the judgment of the court below.

Dated: May 2, 1983.

Respectfully submitted,

Rosana M. Selesnick

ROSANA M. SELESNICK, Attorney for Appellant

PROOF OF SERVICE BY MAIL

I, Saul M. Ferster, declare:

I am a citizen of the United States and am employed in Los Angeles, California. I am over the age of 18 years and am not a party to the action named in the attached document. My business address is 1880 Century Park East, Suite 304, Los Angeles, California 90067. On November 20, 1989, I served a copy of the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the Petitioner by placing a true copy thereof in an envelope sealed with postage thereon fully prepaid in the United States mail in Los Angeles, California, addressed as follows:

John K. Van De Kamp, Attorney General
Donald F. Roeschke, Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on November 20, 1989.

SAUL M. FERSTER